No. 91-948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF THE LUKUMI BABALU AYE, INC.
and ERNESTO PICHARDO,

Petitioners,

v.

CITY OF HIALEAH, FLORIDA

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principle of religious liberty. The organization's objectives and purposes include promoting the constitutional principle of the free exercise of religion, opposing any encroachment by government which would limit or tend to inhibit such exercise, and responding to other acts interfering with the full experience of religious freedom.

The Council is a membership organization with dues-paying members located throughout the United States. The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, but all recognize the importance of preserving and promoting the right of religious organizations to carry out their ministries free from governmental intrusion to the greatest extent permissible in a complex society, whether that interference be from the executive, legislative, or judicial branches of government.

This case is the first opportunity that this Court has had to apply the Free Exercise Clause of the First Amendment after this Court's calamitous decision in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990). The Council believes that this case demonstrates the need to revisit *Smith* and determine whether the analysis utilized by the majority in that decision carries out the purpose of the Free Exercise Clause.

The Council believes that the *Smith* decision brings confusion, rather than clarity, to free exercise juris-

prudence and that the confusion bred by the *Smith* decision infected the Eleventh Circuit's reasoning. For that reason, the Council suggests reversal is appropriate with a remand of this case.

The Council further believes that its broad perspective on the matter of church-state separation and government intrusion into church affairs, as well as its particular knowledge of various religious beliefs and practices, enables it to bring a dimension of analysis before this Court not necessarily presented by the parties.

Both petitioners and respondent, through their respective counsel of record, have consented to the filing of this brief. A general consent letter is on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

This case demonstrates that the analysis of this Court in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990), is not easily applied and brings confusion, rather than clarity, to free exercise jurisprudence. The court of appeals decision thus applied the Free Exercise Clause to an ordinance in a way that distorts the compelling concerns mandated by the First Amendment.

Amicus requests the Court to revisit its decision in *Smith* and limit its holding to criminal laws which are religiously neutral and of general applicability when the religious act is deemed to be *malum in se*. The early decisions of this Court do not justify the establishment of a rigid rule prohibiting any exemption on free exercise grounds from a neutral law of general applicability regardless of the law's impact.

The rule set forth in *Smith* has already been tried in the early 1940s and was found to be unworkable. Except where the act claiming protection is deemed to be *malum in se*, a court should require the government to demonstrate that the opposing interest it asserts is of special importance. And if the government meets that test, it should still show that the governmental interests asserted will *in fact* be substantially harmed by granting an exemption.

An individual asserting a claim for a religious exemption may be required to first demonstrate that the law does not have merely an incidental effect on his religious belief and to further prove that the exemption claimed will not violate the rights of third parties.

ARGUMENTS

I. THIS CASE DEMONSTRATES THAT THE ANALYSIS UTILIZED IN *SMITH* HAS CONFUSED FREE EXERCISE JURISPRUDENCE.

As petitioners have pointed out, "*Employment Division v. Smith* . . . puts the compelling interest test in a new light. *Smith* divides laws restricting religious exercise into those that are religiously neutral and those that are not." Petition for Writ of Certiorari at 17, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3652 (Mar. 24, 1992) (No. 91-948).

This case demonstrates that the Court's analysis in *Smith*, instead of clarifying and providing a more dependable means of determining when governmental action is unconstitutional under the Free Exercise

Clause, has made it more difficult to apply a judicial yardstick.

Although a majority of the Court in *Smith* may have believed that it was a simple task for a court to determine when a legislative enactment may be deemed to be a "neutral generally applicable regulatory law . . . ," *Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1601 (1990), this case illustrates this not to be so.

The reply brief of petitioners seeking certiorari acknowledged fundamental disagreement over the meaning of the *Smith* opinion. *Id.* at 1. They inquire, "What is a 'neutral and generally applicable law'?" *Id.* at 2.

This case underscores the fact that unless this Court revisits its decision in *Smith*, free exercise rights will depend more on the choice of words utilized in legislation than the aim or purpose of those seeking the legislative enactment.

A religious organization's practices will be permitted or struck down not because of the degree of coercion applied by government or the impact on the public interest resulting from a judicially created exemption but rather by the legerdemain of a legislative body. This is not the stuff of which the Bill of Rights was made.

This first test to the new free exercise analysis promulgated by the majority of the Court cannot properly weigh the delicate and important compelling concerns which this Court must weigh under the mandate of the Religion Clauses of the First Amendment. As pointed out by respondents in their brief in opposition to the petition for certiorari, the court of

appeals here was apparently influenced in its decision by the reasoning in *Smith*. Respondent's Brief in Opposition to Petition for Writ of Certiorari at 10, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3652 (Mar. 24, 1992) (No. 91-948). For the reasons hereinafter stated, we would urge that the Court apply the balancing test which it and many state courts have utilized for 27 years to determine whether the free exercise rights of those here involved have been violated and are entitled to protection from the city's ordinances.

II. THE COURT'S HOLDING IN *SMITH* SHOULD BE RESTRICTED TO CRIMINAL LAWS WHICH ARE RELIGIOUSLY NEUTRAL AND OF GENERAL APPLICABILITY WHERE THE RELIGIOUS CLAIM IS *MALUM IN SE*.

In *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990), this Court refused to apply the compelling state interest/less restrictive alternative test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963). *Smith* involved the use of an hallucinogenic drug which was deemed a criminal offense under the State of Oregon. The majority found:

> Even if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.

110 S. Ct. at 1603. Amicus believes that the instant case presents an opportunity for this Court to consider breathing new life into *Sherbert*.

A review of the early decisions of this Court does not justify the establishment of an arbitrary rule prohibiting any exemption on free exercise grounds from a neutral law of general applicability regardless of the law's impact on religion. In *Reynolds v. United States*, 98 U.S. 145 (1979), the polygamy case cited in the majority opinion in *Smith*, the Court, although rejecting a free exercise exemption for the practice of polygamy, dealt only with a criminal statute and specifically with a practice which the Court stated "has always been odious among the northern and western nations of Europe." *Id.* at 164.

In a subsequent case, *Davis v. Beason*, 133 U.S. 333 (1890), the Court again, in dealing with a criminal statute aimed at the Mormon practice of polygamy, stated:

> It was never intended or supposed that the [first] amendment could be invoked as a protection against legislation for the punishment of acts inimicable to the peace, good order, and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, *it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.*

Id. at 342-43 (emphasis supplied).

The Court in *Davis*, however, did recognize that the

> first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and *to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others,* and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.

Id. at 342 (emphasis supplied).

Three points may be adduced from these two similar free exercise cases. One, the Court did not reject out of hand the contention that a free exercise claim may not result in a judicially declared exemption from a religiously neutral statute of general application. Second, the Court only specifically rejected such a claim as it related to a criminal statute. And third, in both cases the acts for which the free exercise right was claimed were considered odious and destructive to society. *Davis*, 133 U.S. at 345. In fact, in *Davis* the Court found:

> While legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated.

> Crime is not the less odious because sanctioned by what any particular sect may designate as "religion."

These two cases therefore may be summarized as holding that a religious practice may not be exempt from the operation of a criminal statute religiously neutral in form and of general applicability where the religious act is deemed to be *malum in se*.

Such a holding is not inconsistent with the view expressed by Justice O'Connor in *Smith*:

> Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment *never* requires the State to grant a limited exemption for religiously motivated conduct.

Smith, 110 S. Ct. at 1611 (O'Connor, J., concurring) (emphasis supplied).

As Justice O'Connor cogently noted:

> The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.

Id. at 1612 (O'Connor, J., concurring).

In fact, the first case to which this Court applied the Free Exercise Clause to state action involved a

conviction under two separate counts: one under a state statute and one under the common law offense of inciting a breach of the peace. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court held "that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment." *Id.* at 303. The *Cantwell* Court, differing substantially from the reasoning in *Smith*, found:

> The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act

> must have appropriate definition to preserve the enforcement of that protection. *In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.*

Id. at 303-04 (emphasis supplied).

The Court in *Cantwell* was obviously embracing a balancing test in its determination when it stated:

> The state of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.

Id. at 307.

The rule expressed by the Court in *Smith* was previously with us for a short time early in the 1940s but did not withstand subsequent judicial scrutiny. The Court decided *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), a few days after *Cantwell*. That case involved a Jehovah's Witness child refusing to salute the flag for religious reasons. The Court found:

> In the judicial enforcement of religious freedom we are concerned with a historic concept. . . . The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against

> doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

Id. at 594-95.

Significantly, Justice Stone's dissent in *Gobitis* observed the true purpose of the Bill of Rights—that is, the protection of the minority from the will of the majority. He stated:

> History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities. The framers were not unaware that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection.

Id. at 604-05 (Stone, J., dissenting).

Justice Stone, in underscoring the importance of the Bill of Rights, observed:

> The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to the justice and moderation without which no free government can exist. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities.

Id. at 606.

Two years later in *Jones v. Opelika*, 316 U.S. 584 (1942), this Court wrestled with several cases involving city ordinances imposing license taxes upon the sale of printed matter. In each of these cases, members of the Jehovah's Witness sect were convicted of violating the ordinances. The majority of the Court upheld the convictions although giving lip service to the importance of the Bill of Rights. Chief Justice Stone in his dissent, however, noted that "[t]he First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary the Constitution, by virtue of the First and the Four-

teenth Amendments, has put those freedoms in a preferred position." *Id.* at 608 (Stone, C.J., dissenting). In a separate dissent in *Jones*, Justices Black, Douglas, and Murphy, who had previously joined with the majority in the *Gobitis* decision, recanted, stating:

> Since we joined in the opinion in the Gobitis case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be. The First Amendment does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinions in these and in the Gobitis case do exactly that.

Id. at 623-24 (Black, Douglas, Murphy, J., dissenting).

In 1943 the pernicious claim that the legislative will could overpower the rights guaranteed free men and women under the Bill of Rights was swept aside in two decisions. The first case, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), involved a city ordinance imposing a licensing fee on all persons canvasing or soliciting within the municipality. The Court determined that Jehovah's Witnesses operating within the city were exempt from the provision of the ordinance. The Court was not impressed by the fact that the ordinance was of general applicability and did not discriminate on the basis of religion: "The fact that the ordinance is 'non-discriminatory' is immaterial. The protection afforded by the First Amendment is

not so restricted." *Id.* at 115. In *Murdock*, contrary to the majority in *Smith*, the Court found that freedom of religion was not in a subservient position but together with freedom of the press, freedom of speech, was in a preferred position. *Id.*

In the seminal case of *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Court specifically reconsidered its precedent decision in *Gobitis*, a case relied upon by the majority in *Smith*. The Court in *Barnette* specifically interred the *Gobitis* decision concluding that the liberties protected by the Bill of Rights were not to be subject only to such protection as a legislative majority might provide. The Court in *Barnette* observed:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. at 638.

The *Barnette* Court specifically rejected the concept that the legislature by a law religiously neutral and of general application could run roughshod over the religious rights of its people. The Court also rejected the concept that such general legislation could only be tested under a "rational relationship" test. In *Barnette*, the Court observed:

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent *grave and immediate danger to interests which the state may lawfully protect.* It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

Id. at 639 (emphasis supplied).

Justice Black's concurrence in *Barnette* correctly noted:

> No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either *imperatively necessary to protect society as a whole from grave and pressingly imminent dangers* or which, without any general prohibition, merely regulate time, place or manner of religious activity. Decision as to the constitutionality of particular laws which strike at

> the substance of religious tenets and practices must be made by this Court.

Id. at 643-44 (Black, J., concurring) (emphasis supplied).

These earlier cases support Justice O'Connor's carefully articulated view that there is no sound basis in precedent for a holding that any facially neutral and uniformly applicable governmental requirement may prevail over a substantial free exercise claim by the government merely showing it to be "a reasonable means of promoting a legitimate public interest." Such a test, according to Justice O'Connor, "relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides." *Bowen v. Roy*, 476 U.S. 693, 727 (1986) (O'Connor, J., dissenting).

As Justice O'Connor has stated:

> Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.

Id. at 728.

Amicus shares the alarm of Justice O'Connor regarding the Court's announcement in *Smith* that the disfavoring of minority religions is an "unavoidable consequence" under our system of government and that accommodation of such religions must be left to the political process. Amicus also agrees with Justice O'Connor that:

> [T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish.

Smith, 110 S. Ct. at 1613 (O'Connor, J., concurring).

Amicus asks this Court to specifically limit the reasoning set forth in the *Smith* decision to criminal laws which are religiously neutral and of general applicability where the religious claim running afoul of the legislative provision is *malum in se*.

In all other cases, amicus believes that this Court should utilize the free exercise test which over years was developed by this Court and articulated by Justice O'Connor in *Goldman v. Weinberger*, 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting):

> First, because the government is attempting to override an interest specifically protected by the Bill of Rights, the government must show that the opposing interest it asserts is of especial importance before there is any chance that its claim can prevail. Second, since the Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state, the government must show that the interest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual.

In *United States v. Lee*, 455 U.S. 252, 262 (1982), Justice Stevens articulated the view that "it is the objector who must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability." When a statute of general applicability is involved, this amicus would not object if the individual is required preliminarily to prove that his or her religious beliefs and practices are in substantial conflict with a statutory enactment and that an exemption will not result in the violation of rights of third parties. Professor Laycock correctly observed that in the balancing process some consideration may be properly given to the compelling need for the religious exemption. He states:

> The [*Smith*] opinion's talk of centrality as a threshold requirement is thus a manufactured difficulty. But the Court is right that any balancing in the free exercise context must consider the burden on religious exercise as well as the threat to government's compelling interests. The Court says it would be unworkable to deny that point, for to deny it would require "the same degree of 'compelling state interest' to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church." But of course no one ever denied the point, and the Court's reductio ad absurdum boomerangs. The majority appears to say it would "horrible" and inappropriate for judges to recognize the difference between throwing rice and getting married in church. I think they could handle it.

Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 32.

CONCLUSION

Accordingly, amicus curiae urges this Court to overrule or severely limit application of its decision in *Smith*, reverse the judgment of the court of appeals, and remand for further consideration.

Dated: May 26, 1992 Respectfully submitted,

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